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UNITED STATES OF AMERICA	)	MEMORANDUM OF LAW:
	)	
v.	)	RIGHT TO SELF-
	)	REPRESENTATION;
	)	RIGHT TO CHOICE OF
	)	COUNSEL
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	
	)	2 September 2004

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1. Purpose of Memorandum.

On 26 August 2004, the Presiding Officer of Mr. al Bahlul's military commission directed the undersigned, detailed defense counsel, to address the issues of an accused's right to self-representation and counsel of his own choice in the context of military commissions. This Memorandum is provided in accordance with that direction.

2. Facts.

During counsel's initial meetings with Mr. al Bahlul in April 2004, he stated that he did not want detailed defense counsel to represent him. Instead, he stated that he intended to represent himself before the commission. Consistent with Mr. al Bahlul's wishes, on 20 April 2004 detailed defense counsel requested that the Chief Defense Counsel approve a request to withdraw as detailed defense counsel. The Chief Defense Counsel denied the request to withdraw on 26 April 2004. Specifically, the Chief Defense Counsel found that MCO No. 1 and MCI No. 4 required detailed defense counsel to represent the accused despite the accused's wishes. The most relevant provision cited by the Chief Defense Counsel states that detailed defense counsel "shall so serve notwithstanding any intention expressed by the Accused to represent himself." MCI No. 4, para. 3D(2). See also MCO No. 1, para. 4C(4) ("The Accused must be represented at all relevant times by Detailed Defense Counsel.")

After our request to withdraw was denied by the Chief Defense Counsel, detailed defense counsel submitted a request to the Secretary of Defense, General Counsel of the Department of Defense, and Appointing Authority to modify or supplement the rules for commissions to allow for withdrawal of detailed defense counsel and recognize the right of self-representation. See attached memorandum, dated 11 May 2004, entitled "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*"). The Secretary of Defense, General Counsel, and the Appointing Authority have not responded to this request.

Before the military commission on 26 August 2004, Mr. al Bahlul stated that he wished to represent himself. Transcript of 26 August 2004 Commission Hearing (Transcript) at 6, 7, 11, 15, 16, 18. Mr. al Bahlul went on to state that if he is prohibited

from representing himself he desires to be represented by a Yemeni attorney of his own choosing. Transcript at 10, 18-19. Finally, Mr. al Bahlul made clear that he did not wish to be represented by detailed defense counsel, and that he did not accept the services of detailed defense counsel. Transcript at 11, 16, 17, 19.

### 3. Law.

#### A. An Accused has a Fundamental Right to Represent Himself Before a Military Commission.

Binding treaty law, procedural rules for comparable international tribunals for the prosecution of war crimes, and United States domestic law all establish an accused's fundamental right to represent himself, and the concurrent right to refuse the services of appointed defense counsel. This recognized right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993). Not since the Star Chamber of 16th and 17th century England, has defense counsel been forced upon an unwilling accused. *Faretta v. California*, 422 U.S. 806, 821 (1975).

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to represent himself in criminal proceedings. ICCPR, Article 14(3)(d); AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c); Bassiouni at 283. Representative of these three treaties is the ICCPR's mandate that "in the determination of any criminal charge against him, everyone shall be entitled . . . to defend himself in person or through legal assistance of his own choosing." ICCPR, Article 14(3)(d). The plain language of this provision establishes an accused's right to represent himself.

The right of self-representation is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for self-representation before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

It is worth noting that the World War II international military tribunals also recognized the right of self-representation. The rules of procedure governing the Nuremberg military tribunals provided that "a defendant shall have the right to conduct

his own defense.”<sup>1</sup> Similarly, the tribunal for the Far East recognized an accused’s right to forgo representation by counsel except where the Tribunal believed that appointment of counsel was “necessary to provide for a fair trial.”<sup>2</sup>

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution, as well as English and Colonial jurisprudence, support the right of self-representation. In *Faretta v. California*, the Supreme Court found that “forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.” 422 U.S. at 807. In surveying the long history of English criminal jurisprudence, the Supreme Court concluded that only one tribunal “adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding” – the Star Chamber. *Id.* at 821. The Star Chamber which was of “mixed executive and judicial character” and “specialized in trying ‘political’ offenses . . . has for centuries symbolized disregard of basic individual rights.” *Id.*

Soon after the disestablishment of the Star Chamber the right of self-representation was again formally recognized in English law:

The 1695 [Treason Act] . . . provided for court appointment of counsel, *but only if the accused so desired*. Thus, as new rights developed, the accused retained his established right ‘to make what statements he liked.’ The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule . . . has evidently always been that ‘no person charged with a criminal offence can have counsel forced upon him against his will.’

*Faretta*, 422 U.S. at 825-26 (footnotes and internal citations omitted).

This common law approach continued in Colonial America, where “the insistence upon a right of self-representation was, if anything, more fervent than in England.” *Id.* at 826.

This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

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<sup>1</sup> Rule 2(d), Nuremberg Trial Proceedings Vol. 1 Rules of Procedure (Nuremberg Proceedings); Rule 7(a), Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case (Medical Case); Rule 7(a), Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948 (Uniform Rules) (<http://www.yale.edu/lawweb/avalon/imt/imt.htm#rules>).

<sup>2</sup> Article 9(c), Charter of the International Military Tribunal for the Far East (Far East Tribunal) (<http://www.yale.edu/lawweb/avalon/imtfech.htm>).

*Id.* at 827-28 (footnote omitted).

Further, there can be no legitimacy to a view that counsel can be forced upon an unwilling defendant for the defendant's own good:

It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . The right to defend is personal . . . . It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'

*Faretta*, 422 U.S. at 834 (internal citation omitted).

Finally, rules of professional responsibility governing attorneys' conduct also recognize an individual's right to self-representation. In discussing the formation of a client-attorney relationship, one commentary observes "The client-lawyer relationship ordinarily is a consensual one. A client ordinarily should not be forced to put important legal matters into the hands of another or accept unwanted legal services." Restatement 3d of the Law Governing Lawyers, American Law Institute (2000), §14. Similarly, §1.16(a)(3) of the American Bar Association's Model Rules of Professional Responsibility, which exists in each of the Service's rules of professional responsibility, "recognizes the long-established principle that a client has a nearly absolute right to discharge a lawyer." *The Law of Lawyering*, Hazard & Hodes, Aspen Law & Business 2003 (3d ed.), 20-9.

Treaties, procedures of international tribunals, Anglo-American common law, current domestic law, and rules of professional responsibility are unanimous in recognizing a criminal accused's right to self-representation. The only contrary provisions are those found in the procedural rules contained in the orders and instructions designed to implement the President's Military Order establishing the military commissions.

#### B. An Accused has a Fundamental Right to Counsel of His Own Choosing Before a Military Commission.

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPRFF) all recognize an accused's right to be represented by counsel of his own choosing. ICCPR, Article 14(3)(b) and (d);

AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c). The plain language of these provisions unequivocally establish such a right.

Further, the right to counsel of choice is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both allow for representation by counsel of one's own choosing before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

Historically, the Nuremburg military tribunals also recognized the right of an accused to be represented by counsel his own selection, with two of the tribunals requiring only that "such counsel [be] a person qualified under existing regulations to conduct cases before the courts of defendant's country, or [be] specially authorized by the Tribunal."<sup>3</sup> Interestingly, the military tribunal for the Far East and one of the Nuremburg tribunals imposed no limitations on an accused's choice of counsel, although the former did provide for "disapproval of such counsel at any time by the Tribunal."<sup>4</sup>

The internationally recognized right of self-representation in criminal proceedings is consistent with United States domestic law. The Sixth Amendment of the United States Constitution supports the right to counsel of choice; over seventy years ago the Supreme Court wrote "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932). While this right is not absolute, its "essential aim . . . is to guarantee an effective advocate for each criminal defendant." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The right of a criminal accused to be represented by counsel of his own choosing is widely recognized in international and domestic law as being an essential part of the right to present a defense. The decision as to who qualifies as an effective advocate for a foreign national charged with war crimes before a military commission is an individual one which should be permitted each accused. Rules governing military commissions that limit an accused's choice of counsel based solely on the counsel's nationality impermissibly infringe on the right to present a defense, and thus are inconsistent with the law.

### C. The Military Commission Must Respect an Accused's Right to Self-Representation and Choice of Counsel.

Treaties, signed by the Executive and ratified by the Senate, are binding law. U.S. Constitution, Article VI, Clause 2 ("Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land"). The ICCPR has been signed and ratified by the United States.<sup>5</sup> Furthermore, the President has

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<sup>3</sup> Rule 7(a), Medical Case; Rule 7(a), Uniform Rules, note 1, *infra*.

<sup>4</sup> Article 9(c), Far East Tribunal; Rule 2(d), Nuremburg Proceedings, note 2, *infra*.

<sup>5</sup> <http://www.unhchr.ch/pdf/report.pdf>

ordered executive departments and agencies to “fully respect and implement its obligations under the international human rights treaties to which [the United States] is a party, including the ICCPR.” Executive Order 13,107, Section 1(a), 61 Fed.Reg. 68,991 (1998). The Executive Order provides that “all executive departments and agencies . . . including boards and commissions . . . shall perform such functions so as to respect and implement those obligations fully.” Executive Order 13,107, Section 2(a).

The commission is also bound by customary international law. Customary international law is developed by the practice of states and “crystallizes when there is ‘evidence of a general practice accepted as law.’” Yoram Dinstein, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 5 (Cambridge University Press 2004). The United States considers itself bound by customary international law in implementing its law of war obligations. Department of Defense Directive (DODD) Number 5100.77, DoD Law of War Program, Dec. 9, 1998, para. 3.1 (“The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.”); DODD Number 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees, Aug. 18, 1994, para. 3.1 (“The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions.”); Field Manual 27-10, *The Law of Land Warfare*, July 1956, Chapter 1, Section I, para. 4 (the law of war is derived from both treaties and customary law).

Finally, Article 21, Uniform Code of Military Justice, which the President cites as authority for the military commissions, recognizes that jurisdiction for military commissions derives from the law of war. 10 U.S.C. Section 821 (jurisdiction for military commissions derives from offenses that “by the law of war may be tried by military commission”); see also Manual for Courts-Martial, 2002 edition, Part I, para. 1 (international law, which includes the law of war, is a source of military jurisdiction). Just as the jurisdiction of military commissions are bounded by the law of war, so the procedures followed by military commissions must comply with the law of war, whether it be codified or customary.

The ICCPR, AMCHR, CPHRFF, ICTY and ICTR rules, and United States domestic law establish that self-representation and counsel of one’s choosing are recognized as rights that must be afforded as part of one’s ability to present a defense. Additional Protocol I to the Geneva Conventions provides that a court trying an accused for law of war violations “shall afford the accused before and during his trial all necessary rights and means of defence.” Geneva Conventions (1949), Additional Protocol I, Article 75, para. 4(a). The United States considers Article 75 of Additional Protocol I to be applicable customary international law. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int’l L. 319, 322 (Summer 2003)(“[the United States] regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.”)

The military commission is bound by treaties, international agreements, and customary international law, all of which recognize an accused's right to self-representation and choice of counsel. Any provisions in the President's Military Order, or the Military Commission Orders and Instructions, that conflict with those rights are unlawful.

4. Attached Files.

A. Memorandum, dated 11 May 2004, "Request for Modification of Military Commission Rules to Recognize the Right of Self-Representation, *United States v. al Bahlul*."

/s/

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/s/

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